Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

GREGORY J. COVUCCI,
Petitioner,

v.

SERVICE MERCHANDISE COMPANY, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, with respect to Petitioner's claim of handicap (disability) discrimination in employment brought under Ohio's disability statute, Petitioner demonstrated sufficient evidence of a disabling condition and whether Respondent had sufficient knowledge of the existence of a disability to trigger a duty to engage in an interactive process and whether its "one hundred percent healed" return to work policy and its one year maximum duration of sick leave absence violated Ohio's disability statute under the circumstances of this case.

2. Whether Petitioner has stated a valid claim under Ohio's Public Policy Tort Common Law Theory of Liability based on allegations that he was terminated in retaliation for filing and pursuing a claim of workers compensation when Petitioner was terminated pursuant to a one year maximum leave policy.

PARTIES TO THF PROCEEDING

Gregory J. Covucci, Petitioner and Plaintiff-Appellant below, is an individual resident of the City of Toledo, County of Lucas, State of Ohio and was formerly employed by Respondent.

Service Merchandise Company, Inc., Respondent and Defendant-Appellee below, is a retail establishment serving the general public. Respondent al all times material hereto has been engaged in an industry affecting commerce and maintained a store (since closed) located in Lucas County, Ohio, where Petitioner was employed. There are no parent companies and no subsidiary corporations of Respondent.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on October 20, 2004. This decision was not recommended for full text publication by the Sixth Circuit and is unpublished. This decision is attached hereto as Appendix A. The Order of the Northern District of Ohio, Western Division (per Judge James G. Carr) granting Respondent's Motion for Summary Judgment in all respects was entered June 30, 1998 and is unpublished. See Appendix B. This Order was accompanied by a Judgment Entry also entered by the District Court on June 30, 1998. The Judgment Entry is also unpublished and is attached hereto as Appendix C.

STATEMENT OF JURISDICTION

The jurisdictional basis for federal jurisdiction in the Court of first instance was pursuant to 42 U.S.C. § 1332, known as Diversity of Citizenship jurisdiction. Plaintiff had originally filed his action in the Lucas County, Ohio, Court of Common Pleas and the action was removed by Respondent. Petitioner invoked the jurisdiction of the United States Court of Appeals for the Sixth Circuit pursuant to 29 U.S.C. Section 1291. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1).

STATUTORY PROVISIONS INVOLVED

The Statutes involved, Ohio Revised Code Sections 4112.01(a)(13), 4112.02(A) and 4112.99 as amended are set forth in Appendix D.

STATEMENT OF THE CASE

Statement of Facts

Petitioner was a full-time Assistant Manager of the Sight and Sound Department for Respondent's store in Toledo, Ohio. Petitioner testified that on February 6, 1994 at approximately 4:30 p.m. he was involved in moving a stack of patio chairs. In the process of tipping the load, one of the legs of the chair snapped and the load fell over on top of Covucci. Covucci testified that when the leg snapped, it was in a vertical position and it whipped at him and hit him about the right shoulder, the head and the arm. After the incident, Petitioner testified that he saw Dr. Mark Fine on April 10, 1994 and treated with him or doctors in his clinic until the first part of October and that he, thereafter, saw Gordon Mather, M.D. but was not able to get in to see Dr. Mather until January 17, 1995. Petitioner testified that although he last saw Dr. Mark Fine on October 4, 1994, he did not see Dr. Mather until January 17, 1995. However, Petitioner testified that he was on stand-by with Dr. Mather's office waiting for an opening and that he was fully engaged in physical therapy at Central Park West.

In the record, doctor slips excused Petitioner from work through October 4, 1994. Petitioner testified that in each one of these separate sheets he provided the document to Respondent. Dr. Fine's letter, as previously discussed, extended the leave date to October 30, 1994. Petitioner

admitted that he did not provide a physician's statement regarding inability to work from October 31, 1994 through the date of his termination in February 1995. However, Petitioner testified that he informed Respondent that he had a change of physicians and that he was advised that as soon as he received a note from him he should forward that to Service Merchandise. Covucci testified that he sent a copy of Respondent's Deposition Exhibit 7 to the store manager prior to his termination. Moreover, Petitioner testified that he did not receive notification of his termination. Petitioner also testified that his leave of absence did grant him one (1) year so he was, in his mind, excluded from having to provide any kind of notification. During 1994, when he was off on leave, Petitioner testified that he had asked for light duty work many times by phone calls. Petitioner testified that despite his request for light duty work, he was advised by John Sidwell that he could not return to work until he was able to perform his job duties as he did before the date of his injury.

Relative to his own physical condition, Petitioner testified that after October 30, 1994 through the time period of February of 1995, he was not able to walk and that he never walked anywhere. He testified he had a lot of pain and was unable to really move about and saved his movement for important tasks he needed to do. He testified that he did not move about freely. The record contains a Physical Therapy Plan dated October 26, 1994 signed by Dr. Mark Fine extending therapy for an eight week period as well as physical therapy billings received by Respondent's third party administrator.

John H. Sidwell, Store Manager of Store 283 testified that Covucci was placed by Respondent on Workers' Compensation Leave. Covucci's last day of work was February 25, 1994 and the official leave of absence begin

date was March 5, 1994. Sidwell also acknowledged, in his deposition, that he was contacted by Petitioner in June of 1994 asking to come back on a limited basis. Sidwell stated that he told Appellant at that point the company had documentation that Covucci was still on leave and that he did not want Covucci to come back unless he was released. Sidwell also testified that other individuals would have been available to assist Covucci in performing his job duties and admitted that he had never spoken with any of Covucci's physicians and that he had not discussed with any physicians any job duties that Covucci was required to perform as Assistant Sight and Sound Manager.

The end date of Petitioner's leave was extended from August 15, 1994 to August 31, 1994 to November 15, 1994 and then to December 19, 1994. For no known apparent reason, Covucci's leave was re-started on December 27, 1994 with an end date of January 15, 1995. This took place after Respondent knew of Dr. Fine's refusal to extend Covucci's leave past October 30, 1994. Again, Covucci's end date was extended by Defendant until February 15, 1995. Although Covucci never received the certified letter requesting him to return to work or furnish medical documentation by February 3, 1995, Respondent terminated him before the certified letter was returned to Defendant unclaimed on February 16, 1995 and before Covucci's extension of leave expired on February 15, 1995 and before the one year anniversary of his leave on March 5, 1995. Sidwell testified that Covucci was terminated on February 10, 1995. The Respondent maintains that Petitioner was afforded his one year of leave relying on different dates that it maintains are the accurate dates.

Description of Proceedings Below

Petitioner sought relief under Ohio's Handicap Discrimination Statute and pursuant to the Public Policy of the State of Ohio under Ohio Common Law. Plaintiff's action filed in the Common Pleas Court of Lucas County, Ohio was removed by Respondent to the United States District Court for the Northern District of Ohio, Western Division on the basis of Diversity of Citizenship Jurisdiction.

On Respondent's Motion for Summary Judgment, the District Court granted Respondent's Motion for Summary Judgment and dismissed Petitioner's claims under Ohio's Handicap Discrimination Statute which had been brought pursuant to Ohio's Revised Code § 4112.02 and Ohio's Common Law Public Policy Tort Theory. The District Court opined that Petitioner had not raised a genuine issue of material fact as to whether he was handicapped. The Court reasoned that the evidence was that Petitioner's condition was temporary and curable. The District Court further reasoned that there was no evidence that Respondent knew of the handicap and no evidence that Petitioner was able to perform his job with reasonable accommodation or that Respondent denied such requests. The District Court also dismissed Petitioner's piggyback public policy claim for disability discrimination under Ohio common law. As to Petitioner's public policy claim for workers compensation retaliation, the District Court held that Petitioner's claim was barred under Ohio's public policy because he did not give the 90 day notice of claimed violation required by the statutory remedy in Ohio Revised Code Section 4123.90.

Petitioner appealed to the United States Court of Appeals for the Sixth Circuit. There, he presented argument that he was a qualified person with a disability (handicap) within the

meaning of Ohio Revised Code Section 4112.01(a)(13). He further contended that the Respondent had failed to engage in an interactive process by having a policy whereby an employee could be returned to work only on an unrestricted basis. Petitioner also contended that his worker's compensation claim should not be barred by any failure to send out a 90 day notice or by limitations periods contained in the workers compensation retaliation statute as his claim was based on common law.

In an opinion filed on October 20, 2004, the United States Court of Appeals for the Sixth Circuit affirmed the decision of the District Court (Appendix A). The Sixth Circuit held that even assuming that Petitioner had established a prima facie case, he failed to show the Respondent's stated nondiscriminatory reason was pretextual. The Court held that Petitioner had exceeded the Respondent's one year leave policy. The court held that a related piggyback public policy claim based on disability discrimination was also barred. With respect to Petitioner's public policy claim based on workers compensation retaliation, the Sixth Circuit held that the claim was barred in the Petitioner did not comply with the procedural mandates of Ohio Revised Code Section 4123.90 which required a filing of a notice of claimed violation of statute within 90 days and the filing of suit within 180 days of the complained of event. The Court also held that Petitioner could not show that he was retaliated against because he had been retained as an employee for the one year period pursuant to the employer's policy.

Petitioner notes that this case has been stayed while in the Sixth Circuit as Respondent filed a bankruptcy petition in the U.S. Bankruptcy Court in the Middle District of Tennessee on March 23, 1999. On June 14, 2004, the Bankruptcy Court issued an Order lifting the automatic stay as it related to

Petitioner's claims and the matter proceeded to oral argument and ruling before the Sixth Circuit.

REASONS FOR GRANTING THE PETITION

Handicap (disability discrimination claim)

Petitioner has alleged that he was a handicapped person within the meaning of Ohio Revised Code § 4112.01(a)(13). Ohio law has been held by State Courts in Ohio to be largely parallel to the Americans with Disabilities Act. See *Plumbers' and Steamfitters' Joint Apprenticeship Committee v. Ohio Civil Rights Commission,* (1981), 66 Ohio St. 2d 192, 196.

Petitioner's leave began on March 4, 1994 subsequent to his injury. Petitioner testified that he sought light duty work in June of 1994. Respondent admitted that it could not honor Covucci's request for accommodation because his doctor had him off as totally disabled at that time. Respondent never discussed job functions with the doctors, and Dr. Fine himself, in his deposition, said that he knew that Covucci's job only involved some lifting. Petitioner submits that medical records and his deposition testimony establish a disabling condition and affect upon working and every day activities. *Toyota Motor Mfg. Ky., Inc. v. Williams*, 534 U.S. 184 (2002). Note that the Sixth Circuit assumed for purposes of argument, that Petitioner had demonstrated a prima facie case. The Sixth Circuit proceeded to focus upon Petitioner's failure to establish the the reason advanced for Mr. Covucci's termination, absence beyond the one year rule, was pretextual. Petitioner has established facts which if found credible, would establish that he was terminated prior to the expiration of one year. Moreover, the one year rule itself and the requirement that Petitioner return to work unrestricted, created barriers to Respondent's requirements to engage in a

meaningful interactive process and to provide a reasonable accommodation. The record shows that Respondent was aware of Petitioner's continuing medical problems which continued on past his termination date in February of 2005.

Respondent has not shown that it made any attempt to accommodate Covucci. Nor did Respondent, in fact, actually contact Covucci before it terminated him effective February 10, 1995. It is clear that Respondent, in June of 1994, would return Petitioner only on an unrestricted basis as detailed above. Given the record in this case, it is questionable, first of all, whether lifting was an essential job function. Although lifting depended on displays, Mr. Sidwell testified that often there were four or five or six persons who worked under him and other people would assist other departments when asked. Sidwell simply did not go beyond the doctor's excuse and did not look at the company's policy on accommodating individuals with a disability. It is submitted that, Petitioner testified that while he was off on leave, he made numerous requests for alternative employment and/or for accommodation. See *Benson v. Northwest Airlines*, 62 F. 3d 1108 (8th Cir. 1995). Once an accommodation has been requested, the employer should initiate an interactive process with the individual. In *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105 (9th Cir. 2000), *vacated on other grounds*, 535 U.S. 391 (2002), the Court noted that the interactive process requires employers to analyze job functions to establish the essential and nonessential job tasks to identify the barriers to job performance by consulting with the employee to learn the precise limitations and to learn the types of accommodations which would be most effective. See also *Taylor v. Phoenixville School District*, 184 F.3d 296 (3d Cir. 1999).

Moreover, the determination of whether a given function is "essential" within the meaning of the ADA and regulations

promulgated thereunder is typically a question of fact for the jury. See *Hall v. United States Postal Service*, 857 F.2d 1073, 1079 (6th Cir. 1988); *Brickers v. Cleveland Board of Education*, 145 F. 3d 846 (6th Cir. 1998). Moreover, two courts have concluded that a "no restrictions" policy governing the return to work is a per se violation of the ADA. See *Norris v. Allied-Sysco Food Services, Inc..*, 948 F. Supp 1418 (N.D. Cal. 1996); *Hutchinson v. United Parcel Service, Inc.*, 833 F. Supp 379, 397 (N.D. Iowa 1995)(Employer's policy that employee had to be "100% healed" before being permitted to return to work was a per se violation of the ADA.). In *Henderson v. Ardco, Inc.*, 247 F.3d 645 (6th Cir. 2001), the Defendant had a 100 percent healed policy with respect to an assembly line worker who made doors and doorframes for commercial refrigerators. In *Henderson*, the case does not describe whether the policy was written or unwritten. Nonetheless, the Court there found that the policy was "well-known and consistently applied, at least with regard to lifting restrictions, and is assumed to exist for purposes of summary judgment. *Henderson*, 247 F.3d 647. The Sixth Circuit noted in Henderson that where the 100 percent rule is applied to mildly impaired person to exclude them from a broad class of jobs, it may be treating them as disabled even if they are not, thereby qualifying them for protection under the ADA and parallel statutes, and activating the individual assessment rule. The court further noted that the variability of the impairment-relevant job requirements within the business applying the 100 percent rule is important, because it indicates the breadth of the class the employer perceives when the employer applies the rule.

While the Sixth Circuit endorsed the one year limit on Petitioner's leave of absence as a legitimate non discriminatory business reason justifying Petitioner's termination, most authority indicates that unpaid leave is itself

a form of reasonable accommodation. The Sixth Circuit itself has questioned the propriety of a per se rule such that a leave of indefinite duration could never constitute a reasonable accommodation. *Cehrs v. Northeast Ohio Alzheimer's Research Center*, 155 F.3d 775 (6th Cir. 1998). See also *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638 (1st Cir. 2000).

Prior to the expiration of the one year leave policy, even if justified and even assuming that Petitioner did receive the benefit of the full one year, which he denies, Petitioner's requests for accommodation as early as June of 1994 triggered the Respondent's duty to engage in an interactive process well prior to the expiration of the one year anniversary. Petitioner's related piggyback public policy tort claim for disability discrimination under Ohio common law should also be reinstated if the statutory claim is viable.

Workers Compensation Retaliation Claim

The Sixth Circuit has held the Petitioner's public policy tort claim brought under Ohio common law for workers compensation retaliation is meritless because Petitioner has not brought forth any evidence that the company took any retaliatory action for filing his claim. The Sixth Circuit here assumed the validity of the one year leave of absence policy. Petitioner clearly had instituted workers compensation proceedings, had notified Respondent of counsel shortly prior to his termination along with a change of physician form. He was thereafter promptly terminated from employment. Since the termination of Petitioner, the Ohio Supreme Court in *Coolidge v. Riverdale Local School District* (2003), 100 Ohio St. 3d 141, has held that an employee receiving temporary total disability compensation under Ohio's workers compensation statute may not be discharged solely on the

basis of absenteeism or inability to work as a matter of public policy. Moreover, the Sixth Circuit further held that this claim was barred by a 180 day statute of limitations applicable to a statutory workers compensation remedy which included a requirement that Plaintiff give 90 days notice of claimed violation. In a case involving workplace safety, the Ohio Supreme Court has held that public policy tort claims are subject to a four year statute of limitations in Ohio. *Pytlinski v. Brocar Products, Inc.* (2002), 94 Ohio St. 3d 77. See also *Celeste v. Wiseco Piston*, 151 Ohio App. 3d 554 (Ct. App. Lake Cty., 2003).

CONCLUSION

For reasons set forth in this Petition for Writ of Certiorari, Petitioner Covucci respectfully requests that a writ issue as prayed for in order to review the aforedescribed Sixth Circuit Opinion set forth in Appendix A.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 98-3823

[Filed October 20, 2004]

GREGORY J. COVUCCI,
Plaintiff-Appellant,

v.

SERVICE MERCHANDISE COMPANY, INC.
Defendant-Appellee.

Before: MERRITT, MOORE, and GILMAN, Circuit Judges.

OPINION

RONALD LEE GILMAN, Circuit Judge. Gregory J. Covucci appeals the grant of summary judgment in favor of his former employer, Service Merchandise Company, Inc. The primary issue on appeal is whether the termination of Covucci's employment constituted unlawful handicap discrimination under Ohio law. For the reasons set forth below, we **AFFIRM** the judgment of the district court.

I. BACKGROUND

Covucci incurred a work-related injury to his back on February 20, 1994 while moving a stack of plastic patio chairs. Following his injury, he provided his supervisor with a series of "Excuse from Work" forms signed by his doctor. In June of 1994, Covucci sought permission to return to work in a light-duty capacity, but Service Merchandise refused to allow him to do so until a physician authorized his return. The last Excuse from Work form that Covucci presented to Service Merchandise excused him from work through October 4, 1994. This form was followed by a letter from his doctor, stating that "our physicians will NOT authorize your being out of work beyond 10/30/94."

Covucci remained on leave through January of 1995, even though he did not provide Service Merchandise with any further Excuse from Work forms. On January 30, 1995, a Service Merchandise Human Resources manager sent Covucci a letter, via certified mail, requesting medical documentation of his continued injury. The letter explained that Covucci's employment would be terminated if he did not provide this documentation. Covucci claims that he never received the letter.

On February 28, 1995, Service Merchandise terminated Covucci's employment. The stated reason for his termination was that the company's leave-of-absence policy permits, at most, a one-year separation from work. Covucci then filed suit in state court, claiming that his termination violated Ohio's Handicap Discrimination Statute, Ohio Rev. Code § 4112.02(A). He also contended that his termination violated the public policy embodied in Ohio Rev. Code § 4123.90, which prohibits retaliation against employees who file workers' compensation claims. Service Merchandise removed

the case to federal court based on diversity of citizenship. After the completion of discovery, Service Merchandise moved for summary judgment. The district court granted Service Merchandise's motion. Covucci now appeals.

II. ANALYSIS

A. Standard of review

We review a district court's grant of summary judgment de novo. *Therma-Scan, Inc. v. Thermoscan, Inc.*, 295 F.3d 623, 629 (6th Cir. 2002). Summary judgment is proper where there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In considering a motion for summary judgment, the district court must construe all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). The central issue is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

B. Covucci's claim of handicap discrimination under Ohio Rev. Code § 4112.02(A)

In order to establish a prima facie case of handicap discrimination under Ohio law, a plaintiff must prove that (1) he is handicapped, (2) an adverse employment action was taken by his employer, and (3) even though handicapped, he can safely and substantially perform the essential functions of the job in question. *Hood v. Diamond Prods., Inc.*, 74 Ohio St. 3d 298, 1996 Ohio 259, 658 N.E.2d 738, 741 (Ohio 1996). Once the plaintiff establishes a prima facie case, the

burden shifts to the employer to set forth a legitimate, nondiscriminatory reason for its action. *Id.* The burden then shifts back to the employee to demonstrate that the employer's stated reason was a pretext designed to mask impermissible discrimination. *Id.*

Service Merchandise argues that Covucci failed to establish a prima facie case of discrimination because he was unable to show that he was handicapped. The district court agreed with this argument in granting summary judgment for Service Merchandise. There is no need for us to analyze the elements of Covucci's prima facie case, however, in order to resolve this lawsuit. Instead, we will proceed to the second and third parts of the burden-shifting analysis because, even if we were to assume that Covucci had made out a prima facie case, he failed to show that Service Merchandise's stated nondiscriminatory reason for his termination was pretextual.

As its nondiscriminatory reason for discharging Covucci, Service Merchandise asserts that Covucci violated the company's Leaves of Absence Policy. The policy provides in pertinent part as follows:

> The employment of an associate will be terminated if the associate fails to return to work from a leave of absence in a timely manner or chooses not to return to work from a medical leave upon release of the attending physician.
>
> . . .
>
> The maximum length of a leave of absence for an associate's own illness or injury or military duty will be one year.

. . .

> An associate who fails to return to work on the scheduled return to work date and/or who, needing an extension to the leave, has not received an approved extension from management may be terminated.

Covucci was not in compliance with the policy when he failed to return to work upon release by his treating physician in October of 1994. He also failed to provide Service Merchandise with any Excuse from Work forms between November of 1994 and February of 1995. Moreover, even if he had submitted the requisite paperwork, Service Merchandise was entitled to terminate Covucci because his leave of absence exceeded the one-year maximum stated in the policy. (Covucci's leave began on February 25, 1994; he was terminated on February 28, 1995.)

Finally, Covucci failed to demonstrate that Service Merchandise's proffered nondiscriminatory reason for terminating him was pretextual. The leave-of-absence policy does not distinguish between handicapped and nonhandicapped individuals. Instead, it imposes a uniform approach in that it provides for the termination of any employee who does not return to work at the end of an authorized leave period or whose absence due to illness, injury, or military service exceeds one year. Nor has Covucci presented any evidence that Service Merchandise applied its policy unfairly or inconsistently. Because Covucci has failed to raise any genuine issue of material fact as to the legitimacy of Service's Merchandise's reason for terminating him, he cannot succeed in his statutory discrimination claim.

C. Covucci's public-policy claims

Covucci also contends that Service Merchandise terminated him in violation of Ohio public policy, as expressed in Ohio Rev. Code § 4112.02 (relating to handicap discrimination claims) and § 4123.90 (relating to workers' compensation claims). The elements of the tort of wrongful discharge in violation of Ohio public policy are that: (1) a clear public policy exists in a statute, regulation, or common law, (2) discharging employees under circumstances like those involved in the present case would jeopardize the policy, (3) the discharge at issue was motivated by conduct related to the policy, and (4) there was no overriding business justification for the discharge. *Kulch v. Structural Fibers, Inc.*,78 Ohio St. 3d 134, 1997 Ohio 219, 677 N.E.2d 308, 321 (Ohio 1997) In limited situations, an employee may bring a claim of tortious violation of public policy regardless of whether a statutory remedy exists. *Cf. Ferraro v. B.F. Goodrich Co.*, 149 Ohio App. 3d 301, 2002 Ohio 4398, 777 N.E.2d 282 (Ohio Ct. App. 2002) (permitting a suit for wrongful discharge in violation of public policy based on age discrimination despite the fact that a separate statutory remedy exists for age discrimination).

As to Covucci's public-policy claim based on § 4112.02, the statute itself is evidence of a clear public policy against disability discrimination. But, as noted above, Covucci failed to establish that his discharge was motivated by unlawful discrimination based on an alleged handicap. His public-policy claim therefore lacks merit. *See Cochran v. Columbia Gas of Ohio, Inc.*, 138 Ohio App. 3d 888, 742 N.E.2d 734, 740 (Ohio Ct. App. 2000) (holding that an employee who failed to establish a prima facie case of handicap discrimination could not sustain a claim of wrongful discharge based on public policy).

Similarly, Covucci's public-policy claim based on § 4123.90 is without merit. Section 4123.90 prohibits employers from taking retaliatory action against employees who file workers' compensation claims. But Covucci has not offered any evidence that Service Merchandise rejected or delayed his workers' compensation claim or that the company took any other retaliatory action in response to the filing of his claim. In fact, Covucci remained employed by Service Merchandise for nearly a year after his claim was filed.

Covucci's common law claim is also barred because he did not comply with the procedural mandates of § 4123.90. *Cf. Kulch*, 677 N.E.2d at 322-23 (holding that a plaintiff who had not strictly complied with the requirement of Ohio Rev. Code § 4113.52, the whistleblowing statute, could not pursue a public-policy common law claim based on the same statute). Section 4123.90 provides that any action instituted by an employee to redress a violation "shall be forever barred unless filed within one hundred eighty days immediately following the [adverse action], and no action may be instituted or maintained unless the employer has received written notice of a claimed violation . . . within ninety days immediately following the [adverse action]." § 4123.90. Covucci failed to comply with either of the time deadlines. He cannot, therefore, secure the protections embodied in the statute by asserting a common law claim as a means of bypassing the statutory requirements. *Cf. Kulch*, 677 N.E.2d at 322-23.

III. CONCLUSION

For all of the reasons set forth above, we **AFFIRM** the judgment of the district court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Filed June 30, 1998]

3:98CV7014

Gregory J. Covucci, *Plaintiff*,	)
v.	)
Service Merchandise Co., *Defendant*.	)

Order

This is a handicap discrimination case brought under O.R.C. § 4112.02(A). Because the parties are diverse and the amount in controversy exceeds $75,000, this court has jurisdiction pursuant to 28 U.S.C. § 1332. Pending is defendant's motion for summary judgment. (Doc. 7). For the following reasons, defendant's motion shall be granted.

Background

Plaintiff Gregory Covucci worked at one of defendant's stores in Toledo, Ohio, from November, 1990, through

February 25, 1994. On or about February 20, 1994, plaintiff allegedly injured his back while carrying some plastic patio chairs at work. He was able to work on February 23, 1994, and February 25, 1994. On February 25, however, he gave defendant a physician's statement noting that he had been under the care of Robert McCarthy, M.D., since February 21, and would be able to return to work on February 28. According to Dr. McCarthy, plaintiff suffered from lower back pain but his prognosis at the time was excellent.

Plaintiff, however, did not return to work on February 28. Rather, he continued to provide defendant with "Excuse from Work" forms indicating that he could not yet return to work.

The last "Excuse from Work" form received by defendant excused him from work through October 4, 1994. This form, dated September 7, 1994, indicates that plaintiff was diagnosed with lumbar strain and that his prognosis was fair.[1] This form was followed by a letter from plaintiff's treating physician, Mark D. Fine, M.D., which stated that "[o]ur physicians will NOT authorize your being off work beyond 10/30/94."

Defendant kept plaintiff's position open for several months, until June, 1994, when they filled it by promoting another employee. Around this time, plaintiff called defendant and asked that he be permitted to return to work with a different, lighter duty assignment. Defendant, however, refused io allow plaintiff to come back at all until he was released to work by a physician.

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[1] Although the form actually says that plaintiff s diagnosis is fair and his prognosis lumbar strain, it is reasonable to infer that this was a clerical mistake.

Based on plaintiff's physician statements, defendant continued to extend plaintiff's return to work date through the summer and fall of 1994. Even after it stopped receiving "Excuse from Work" forms, defendant extended plaintiff's leave into January, 1995. On January 30, 1995, defendant sent a certified letter to plaintiff's home requesting that he provide medical documentation of his condition, otherwise, the letter stated, he would be terminated. Plaintiff never received defendant's certified letter.

Between October, 1994, and January, 1995, plaintiff was engaged in physical therapy at Central Park West Rehabilitation Center in Toledo, Ohio. On January 17, 1995, he saw Gordon Mather, M.D. There is no evidence, however, that plaintiff provided defendant with medical documentation from either of these sources.

Plaintiff was terminated in February, 1995. Defendant claims that plaintiff was fired on February 28, 1995, in accordance with defendant' s leave of absence policy, which permits, at most, a one-year leave of absence. Plaintiff, however, claims that he was fired on February 10, 1995, in violation of leave of absence policy and Ohio' s handicap discrimination laws.

Plaintiff' s first suit was filed in this court in November, 1996. In that action, plaintiff alleged both federal and state causes of action. Specifically, he claimed that defendant (1) discriminated against him in violation of the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq., (ADA) and O.R.C. § 4112.02(A); (2) discharged him in violation of the Family Medical Leave Act, 29 U.S.C. § 2601 et seq., and (3) retaliated against him in violation of public policy embodied in O.R.C. § 4123.90. On December 12, 1997, I dismissed plaintiff's two federal claims, finding the ADA claim time-

barred and the FMLA claim unsupportable. Because plaintiff plead neither defendant's state of incorporation nor principal place of business, there was no basis for diversity jurisdiction. Therefore, having dismissed the two federal claims, I dismissed plaintiff's two state claims without prejudice.

Plaintiff refiled his two state claims in state court. Defendant removed those claims, on the basis of diversity of citizenship, to this court. Defendant now moves for summary judgment on each claim.

Discussion

Summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will beat the burden of proof at trial." *Celotex Corp. v. Catrett*, 447 U.S.317, 322 (1986). The moving party bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrste the absence of a genuine issue of material fact. Id. at 323. The burden then shifts to the nonmoving party who "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*447 U.S. 242, 250 (1986) (*quoting* Fed. R. Civ. P. 56(e)).

A. Handicap Discrimination

To establish a prima facie case of handicap discrimination under O.R.C. § 4112.02, a plaintiff must demonstrate that 1) he or she was handicapped, 2) an adverse employment action was taken by his or her employer, at least in part, because of the handicap, and 3) he or she can safely and

substantially perform the essential functions of the job in question. *Hood v. Diamond Prods., Inc*, 74 Ohio St.3d 298, 302 (1996). Although it is not expressly part of the traditional prima facie case, a plaintiff must also show that the defendant knew or believed that the plaintiff suffered a handicap, because a defendant who does not know of a disability can hardly discriminate "because of" that handicap. *Kocsis v, Multi-Care Mgmt., Inc.*, 97 F.3d 876, 884 (6th Cir. 1996). *See also Simpkins v. Specialty Envelope. Inc.*, 1996 WL 452858, *5 (6th.Cir. Aug. 9, 1996) (because plaintiff failed to demonstrate that defendant knew about her disability, her ADA claim failed).

Defendant first claims that plaintiff's claim must fail because he cannot demonstrate that he suffered from a handicap at the time he was terminated. Pursuant to O.R.C. § 4112.01(A)(13), a handicap is defined as "a physical or mental impairment that substantially limits one or more major life activities, including the functions of caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working; a record of a physical or mental impairment; or being regarded as having a physical or mental impairment." I agree with defendant that plaintiff has not raised a genuine issue of material fact as to whether he was handicapped.

Plaintiff submitted documentation to defendant that excused him from work until October 30, 1994. After that time, however, there is no credible evidence to support his assertion that he suffered a handicap. Indeed, the only evidence to which plaintiff points is his own deposition testimony that his major life activities of walking and working were affected (Covucci Dep. at 163) and several physical therapy notes from October, November and December, 1994, and January, 1995. The physical therapy notes, while they

certainly reveal that plaintiff's condition was serious enough to require regular therapy, do not indicate that plaintiff's condition was anything but temporary and curable. Therefore, they do not demonstrate that plaintiff suffered from a handicap. *Maloney v. Barberton Citizens Hosp.*, 109 Ohio App.3d 372, 376 (1996) (transitory back injury, with no residual effects, is not a handicap under O.R.C. § 4112.02 or ADA). *See also Sanders v. Arneson Prods., Inc.*, 91 F.3d 1351, 1354 (9th Cir. 1996) (temporary psychological impairment lasting less than four months was insufficient to constitute "disability" under ADA); *Kramer v. K&S Assocs.*, 942 F. Supp. 444, 446 (E.D. Mo. 1996) (broken leg which healed completely in approximately six months with little or no long term effects was temporary nonchronic impairment which did not constitute disability within meaning of ADA or handicap within meaning of Missouri Human Rights Act); *Sutton v. New Mexico Dept of Children, Youth and Families*, 922 F. Supp. 516, 518 (1996) (temporary physical disability without more than minimal residual effects cannot sustain claim under ADA).

Second, perhaps more importantly, plaintiff's discrimination claim must fail because there is no evidence that defendant knew about his alleged handicap or acted because of that handicap. After October 30, 1994, plaintiff never provided defendant with medical documentation of a handicap, or even told defendant that he was handicapped and would need accommodation. On the contrary, all defendant knew was that plaintiff had been excused from work for until October 30, 1994, for a back injury, had requested accommodation in June, 1994, before he was cleared to work at all, and was planning on returning to work at some point in the future.

Finally, even if plaintiff were handicapped and defendant knew about it, there is no evidence that plaintiff was able to perform his job with reasonable accommodation or that defendant denied such reasonable accommodation. The only requests for accommodation were made in June, 1994, when plaintiff, by his own admission, had not yet been cleared to return to work. An employer is not required to accommodate indefinitely a handicapped employee who is unable to work at all; attendance is generally an "essential function" of any job *See Monette v. Electronic Data Systems Corp.*, 90 F.3d 1173, 1187 (6th Cir. 1996); *Brandenberger v. Hilti, Inc.*, 52 Ohio App.3d 21, 26 (1989); *Cehrs v. Northeast Ohio Alzheimer Research Ctr.*, 959 F. Supp, 441, 447 (N.D. Ohio 1997)

Because there is no evidence to support a finding that plaintiff was handicapped, defendant knew about the handicap, or plaintiff was a qualified individual, defendant's motion for summary judgment shall be granted as to plaintiff's discrimination claim.

B. Violation of Public Policy

Plaintiff's second claim is that defendant fired him in violation of public policy as expressed in O.R.C. §§ 4112 and 4123.90. O.R.C. § 4112, as discussed above, proscribes, among other things, discrimination on the basis of handicap. Having found that plaintiff has failed to prove that defendant so discriminated, plaintiff's public policy claim based on Ohio's handicap discrimination law must fail.

O.R.C. § 4123.90 prohibits employers from taking adverse actions against employees in retaliation for the filing of a workers' compensation claim. Any action instituted by an employee to redress a violation of § 4123.90 "shall be forever barred unless filed within one hundred eighty days

immediately following the [adverse action], and no action may be instituted or maintained unless the employer has received written notice of a claimed violation ... within the ninety days immediately following the [adverse action]."

It is undisputed that plaintiff did not forward a 90-day letter to defendant or institute an action under § 4123.90 within 180 days of his discharge. Therefore, to the extent that plaintiff claims a statutory violation, that claim is barred. Plaintiff argues, however, that he is asserting a common law public policy based on the policy embodied in § 419-3.90.

Even if such a common law claim is generally maintainable,[2] defendant argues that it is not cognizable in this instance because plaintiff did not comply with the requirements of O.R.C. § 4123.90. I agree.

In *Kulch v. Structural Fibers, Inc.*,78 Ohio St.3d 134 (1997), the Ohio Supreme Court, faced a public policy claim of retaliation in response to whistleblowing. The Court held that because plaintiff had not strictly complied with the requiremems of § 4113.52, the anti-whistleblowing statute on which his claim was based, he could not pursue his public

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[2] My research indicates that an employee who does not comply with the requirements of § 4123.90 cannot maintain an independent cause of action for a violation of public policy under the common law because § 4123.90 itself establishes a private cause of action, remedies, and a statute of limitations for such retaliation. *Hyatt v. Neaton Auto Products Mfg., Inc.*, 103 Ohio App.3d 591, 593-94 (1995); *Moore v. Animal Fair Pet Ctr., Inc.*, 81 Ohio Misc. 2d 46, 49 (Ohio Com. P1. 1995). Because this has not been argued by defendant, however, it is not the basis for my decision.

policy common law claim. 78 Ohio St.3d at 153. Relying on one of its earlier cases, the Court stated:

> By imposing strict and detailed requirements on certain whistle-blowers and restricting the statute's applicability to a narrow set of circumstances, the legislature clearly intended to encourage whistle-blowing only to the extent that the employee complies with the dictates of R.C. 4113.52. As we held in *Contreras [v. Ferro Corp.], supra*, 73 Ohio St.3d 244, 652 N.E.2d 940 [1995], syllabus: "In order for an employee to be afforded protection as a 'whistle-blower,' such employee must strictly comply with the dictates of R.C. 4113.52. Failure to do so prevents the employee from claiming the protections embodied in the statute.

Id.

Defendant claims that *Kulch*, although it addresses public policy claims based on the anti-whistleblowing statute, applies in this case. Specifically, defendant argues that O.R.C. § 4123.90, like O.R.C. § 4113.52, imposes strict and detailed requirements on plaintiffs, thereby indicating the legislature's intent to authorize redress of retaliation for workers' compensation filings only in limited circumstances. Plaintiff does not rebut this argument, nor does my research reveal any reason not to apply *Kulch* to the facts presented here. Therefore, because plaintiff failed to comply with the time limitations provided for in O.R.C. § 4123.90, his public policy claim based on that statute is barred.

Conclusion

For the foregoing reasons, it is hereby

ORDERED THAT defendant's motion for summary judgment (Doc. 7) be, and same hereby is, granted.

So ordered.

/s/ _____
James G. Carr
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Filed June 30, 1998]

3:98CV7014

Gregory J. Covucci, *Plaintiff*,	)
v.	)
Service Merchandise Co., *Defendant*.	)

JUDGMENT ENTRY

For the reasons stated in the Order filed June 30, 1998, IT **IS HEREBY ORDERED, ADJUDGED and DECREED** that

1. The defendant's motion for summary judgment be, and same hereby is, granted.

2. Case closed.

/s/ _____
James G. Carr
United States District Judge

APPENDIX D

RELEVANT STATUTORY PROVISIONS

TITLE 41. LABOR AND INDUSTRY
CHAPTER 4112. CIVIL RIGHTS COMMISSION
ORC Ann. 4112.01

§ 4112.01. Definitions

(A) As used in this chapter:

* * *

(13) "Disability" means a physical or mental impairment that substantially limits one or more major life activities, including the functions of caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working; a record of a physical or mental impairment; or being regarded as having a physical or mental impairment.

* * *

TITLE 41. LABOR AND INDUSTRY
CHAPTER 4112. CIVIL RIGHTS COMMISSION
ORC Ann. 4112.02

§ 4112.02. Unlawful discriminatory practices

It shall be an unlawful discriminatory practice:

(A) For any employer, because of the race, color, religion, sex, national origin, disability, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

* * *

TITLE 41. LABOR AND INDUSTRY
CHAPTER 4112. CIVIL RIGHTS COMMISSION
ORC Ann. 4112.99

§ 4112.99. Civil remedies for violation

Whoever violates this chapter is subject to a civil action for damages, injunctive relief, or any other appropriate relief.

Publisher's Note:

Section 2.02(B) of SB 108 (149 v —) repeals the HB 350 (146 v —) version and section 3(A)(4) revives the former version.

TITLE 41. LABOR AND INDUSTRY
CHAPTER 4123. WORKERS' COMPENSATION MISCELLANEOUS
ORC Ann. 4123.90

§ 4123.90. Discrimination against alien dependents unlawful

The bureau of workers' compensation, industrial commission, or any other body constituted by the statutes of this state, or any court of this state, in awarding compensation to the dependents of employees, or others killed in Ohio, shall not make any discrimination against the widows, children, or other dependents who reside in a foreign country. The bureau, commission, or any other board or court, in determining the amount of compensation to be paid to the dependents of killed employees, shall pay to the alien dependents residing in foreign countries the same benefits as to those dependents residing in this state.

No employer shall discharge, demote, reassign, or take any punitive action against any employee because the employee filed a claim or instituted, pursued or testified in any proceedings under the workers' compensation act for an injury or occupational disease which occurred in the course of and arising out of his employment with that employer. Any such employee may file an action in the common pleas court of the county of such employment in which the relief which may be granted shall be limited to reinstatement with back pay, if the action is based upon discharge, or an award for wages lost if based upon demotion, reassignment, or punitive action taken, offset by earnings subsequent to discharge, demotion, reassignment, or punitive action taken, and payments received pursuant to section 4123.56 and Chapter 4141. of the Revised Code plus reasonable attorney fees. The action shall be forever barred unless filed within one hundred

eighty days immediately following the discharge, demotion, reassignment, or punitive action taken, and no action may be instituted or maintained unless the employer has received written notice of a claimed violation of this paragraph within the ninety days immediately following the discharge, demotion, reassignment, or punitive action taken.

Effective Date: 11-03-1989